

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CHRISTOPHER KHORSANDI, M.D.;  
CHRISTOPHER KHORSANDI, M.D.,  
PLLC; and CATHERINE LE  
KHORSANDI

Appellants,

vs.

SMITH PLASTIC SURGERY, INC.,  
and LANE F. SMITH, M.D.,

Respondents.

Case No.: 80957

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**RESPONDENTS' ANSWERING BRIEF**

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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1)(a) and must be disclosed pursuant to that rule. These representations are made so that the Justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

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1. Publicly held companies associated: None.
2. Law Firm(s) Appearing in the Court(s) Below: SGRO & ROGER.

DATED this 21<sup>st</sup> day of September, 2021.

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## **ISSUES PRESENTED**

1. Whether Nevada's Anti-SLAPP statute protects persons who deny making the defamatory statements.
2. Whether a public review of medical treatment can be deemed an issue of public concern if the individual who authored the review has never been a patient nor a recipient of the treatment referenced in the reviews.

## STATEMENT OF THE CASE

This appeal stems from alleged defamatory statements believed to have been made by Appellants, Christopher Khorsandi, M.D., and Catherine Le Khorsandi (“Khorsandi Parties”) which disparaged Respondents, Lane F. Smith, M.D. and Smith Plastic Surgery ("Smith Parties").

On January 10, 2020, the Khorsandi Parties filed a Special Motion to Dismiss Pursuant to NRS 41.660, or in the Alternative, Motion to Dismiss Pursuant to NRCPC 12(B)(5). (APP026-102). In the Motion, Dr. Khorsandi and Catherine Le denied authoring the defamatory reviews while simultaneously attempting to seek protection under Nevada’s anti-SLAPP statute intended to protect good faith communications in furtherance of the right to free speech. *Id.*

On February 19, 2020 oral arguments took place. (APP139-166). The district court took the matter under advisement and on March 4, 2020, the district court filed the Order. (APP167-175). The Order concluded that Khorsandi Parties could not satisfy the first prong of Nevada's anti-SLAPP statute, given that Dr. Khorsandi and Catherine Le denied making the posts and the public reviews did not automatically qualify as protected speech. (APP170). Specifically, the Order stated, “But since Defendants deny making the statements, the Court finds there cannot be an analysis whether the statements were made in “good faith,” which is the first consideration in each of the NRS anti-SLAPP statutes: NRS 41.637(4), NRS 41.650, NRS 41.660.”



(APP173-174) The court further held that whether [the Khorsandi Parties] made the statements is a question of fact and if [the Khorsandi Parties] did make the statements, they would not be protected under the Nevada anti-SLAPP statute.” *Id.* The Court ended its anti-SLAPP analysis and ultimately treated the motion to dismiss as one for summary judgement, permitting additional time under NRCP 56(d) for limited discovery to allow the [“Smith Parties”] to demonstrate a factual issue for the jury as to the Khorsandi Parties making the relevant statements. (APP175).

On March 31, 2020, the Khorsandi Parties filed a Notice of Appeal. The Khorsandi Parties filed their Opening Brief on July 22, 2021 wherein they take liberties relative to casting dispersions and seeking to incorporate irrelevant, inflammatory material because appealing to passion is the only drive behind the case given that their legal and factual basis are unsound.

### **STATEMENT OF FACTS**

Respondent, Dr. Smith is a quadruple board-certified plastic surgeon who has been practicing in Las Vegas, Nevada for over twenty (20) years. (APP002). On or about July 1, 2019, the Smith Parties became aware of a Google Review displayed on Dr. Khorsandi’s website, who is a competing plastic surgeon in Las Vegas, Nevada. The review was posted by an individual referred to as “Gabby Debruno” who criticized alleged medical treatment she received from Dr. Smith, stating:

I went in for a consultation with Dr. KHORSANDI because of a botched breast augmentation from Lane Smith. Dr. KHORSANDI was extremely welcoming and although there were three people in the room to examine me I felt totally comfortable with him and his team. He examined me and came to the conclusion within five minutes that Lane Smith had put one of my implants in BACKWARDS. I was shocked I had spent seven months in emotional distress for something that could have been fixed way sooner. Anticipating I would be going into surgery again, Dr. KHORSANDI asked me to lean forward so he could manipulate the breast that was lower than the other and just disfigured looking. It was about three minutes of a little uncomfortableness but when I saw the result I was almost in tears. He fixed the augmentation that my previous surgeon told me would be thousands to fix because he wasn't at fault. Not only did Dr. KHORSANDI get my augmentation back to symmetrical, he has brought back my confidence and my trust in the field I trust him 100% and 10/10 would recommend. [sic]. (APP004).

Upon investigation, the Smith Parties found no evidence that anyone with the name "Gabby Debruno" ever treated with Dr. Smith, nor at the Smith Plastic Surgery. Therefore, the Smith Parties sent the Khorsandi Parties a cease-and-desist letter on or about July 12, 2019, asking them to remove any reference to the Smith Parties in the review, as it was defamatory given that Gabby Debruno nor anyone by that name had ever been a patient of Dr. Smith. *Id.* Following this request, the Smith Parties began to receive an influx of negative reviews from individuals Dr. Smith has never treated, claiming to be his patients. (APP004-008).

On August 7, 2019, the Khorsandi Parties, posing under the fictitious name "Cecily S." posted a one-star Yelp Review on Respondents' Yelp stating:

This has got to be the worse doctor on the planet. PLS READ and do NOT go here. They will tell you all these bad reviews are fake. Do me

a favor and read them. Then read the non-suggested ones too. You will see all similar experiences. I bet after this review he will have his staff and friends post more “good” reviews of how great and nice dr Smith is. It’s a pattern folks. READ them and u will see. These real reviews with pics and personal experiences that are NOT fake. If you read all the bad reviews they have similar stories. Dr Smith threaten me with a stupid letter from your ambulance chaser lawyer will not scare me or keep me away from spreading my story. You should of had more respect for your patients and acknowledged you messed me up and wanted to do nothing about it. I never wanted you to touch me again but i wanted you to have respect for me as a patient. You should be an honest doctor but you are too money hungry and arrogant. Then your office claims these are all fake reviews instead of owning up to it. Save your money, time and body and do not go here.

He botched my bbl and refuse to fix it or admit he did a horrible job. This office only cares about \$. My stomach was uneven and I had lose skin and my butt is uneven as well!!!! Jessica is the rudest staff ever. So unprofessional. This doctor is so creepy too and tried to add me on face book when he’s actually married. What an unprofessional place. His bedside manner are disgusting and he’s a horrible surgeon. I had to go to the other side of town to get my body fixed by dr k at Vip In Henderson. I needed bodytite for my lose skin and dr Smith never even suggested this or offered this. I did some research and saw that he doesn’t even do Bodytite. He is so dishonest and is a horrible surgeon. I don’t wish this on my worst enemy. I wasted money and time. Oh and wait for the reply from Jessica about all the awards he has won. Just so everyone know. Best og Ladd vegas aware is fake. lol he hAd to pay them to advertise so they let him win for best breast surgery last year 2018. It’s a award that is “voted” but you have to advertise and pay them \$. Don’t be fooled folks. These awards are fake. Read people’s real life experiences and look at the pics and see how they are treated when there’s an issue. Do u want someone like that doing surgery on u? [sic]. (APP005).

Dr. Smith immediately reviewed his records and researched whether he had ever treated anyone with the name "Cecily S." to which he found no evidence. As a result, Dr. Smith disputed the review with Yelp, knowing it was false and

defamatory, given that “Cecily S.” had never been a patient at his practice. (APP005). Dr. Smith noted that the review was a simultaneous endorsement of Dr. Khorsandi and the Bodytite device, which Dr. Khorsandi uses in his practice. (APP006). Yelp subsequently removed the defamatory August 7, 2019, review.

The very next day, on August 8, 2019, the Khorsandi Parties, again posing as “Cecily S.” posted the following one-star review, which stated the following:

STAY AWAY from this doctor and office. Dr land smith is horrible at her job and the rudest human being I’ve ever met. I thought doctors are supp to be professional and have compassion? Not dr Smith !!!This doctor has horrible bedside manners and is so rude to his patients. He botched my liposuction and refused to fix it. He wants more money instead of fixing what he did wrong. I wouldn’t wish this on my worse enemy. I had to go across town to Henderson to get my lipo fixed. My butt was even and I had lose skin on my stomach. I wouldn’t waste your hard earning money or time with this doctor. Go read all the other 1 star reviews then ask yourself if you think this is how you want to be treated if something goes wrong? [sic]. *Id.*

Again, Dr. Smith asked Yelp to remove this review, given it was clearly false as shown by the difference in details from the previous review posted by the same user. *Id.* Yelp subsequently removed the review.

Once again, on August 9, 2019, the Khorsandi Parties, posing as “Cecily S.”, posted yet another one-star review, which was a word for word copy of the August 8, 2019, review. (APP006). Dr. Smith was forced to again ask Yelp to remove this review due to its untruthfulness. Yelp complied. However, this did not hinder the Khorsandi Parties and on August 14, 2019, “Cecily S.” again placed a one-star Yelp

review which was an exact copy of the reviews from August 8, 2019, and August 9, 2019. (APP007). This time, Dr. Smith's employee replied to "Cecily S." informing her that the Smith Parties knew her true identity and stated that they were aware that she was actually the wife of a competitor, and not a former patient as she claimed. (APP007). On August 14, 2019, before Yelp removed the review, Appellant Catherine Le, posing as "Cecily S." responded to the Smith Parties reply in the following manner:

REPLY to JESSICA

Jessica I do think it's time for you to find a different place to work. A place that you don't need to lie and defend the doctor like this. I am a real patient and I'd be happy to send you my pic of who I am. STOP RESPONDING to everyone who writes negative reviews that they are someone else or they are not a real patient or never had surgery here. NO one has the time to go on here and fight with you or share their experiences unless they had a real problem. Are you going to ever realized you shouldn't have to work at a place that you have to constantly lie and defend the doctor? You have no morals just like the doctor you are employed by and any negative review has to be a competitor or it's fake. You look 1000 worse by doing this and I'd be happy to tell you who I am so that the readers know what kind of place this is. I see that many of the patients had to "prove' who they are. And with that still no apology. All you can do is call the patient to take down the review or come back in to pay more to get it fixed. You should be ashamed of yourself for blaming us who are the victims in this. No one wants to waste \$, put their lives at risks for surgery and have horrible outcome. [sic]. (APP007).

Notably, after being confronted with her defamatory conduct and true identity, Appellant Catherine Khorsandi, a.k.a. "Cecily S." completely shut down her fake

Yelp account. The profile “Cecily S. which was created in August of 2009 and was extremely active in posting reviews, was suddenly gone.

However, this still did not stop the Khorsandi Parties. On or about August 14, 2019, another false and defamatory one-star review appeared on Google Reviews, this time under the moniker “You Tuber.” Upon information and belief, this review was also written by Catherine Le, which stated the following:

STAY away from this place!!! This doctor botched by bbl And refuse to do anything to fix it. They are so horrible and only care about money. They are only nice to you until you book Surgery and if you have any problems , they will not do anything about it. Do you want to go to a doctor that doesn’t want to take care of you? This doctor needs to learn bedside manners. I encourage you to go on YELP and read all of his reviews. Look at all the Negative ones and the un recommended ones. You will see how horrible he treats his patients and how Everyone has similar stories , how he treats people when there’s an issue. Do you want to give a doctor your hard earning \$ and be treated this poorly when he does something wrong to your body? The staff are horrible here too. No one cares about you when you have a problem. Stay away!!!!

My lipo is uneven and I have lose skin on my stomach. I had to go across town to Henderson to another doctor to get it fixed. I recommend you stay way from dr lane smith!!!!!!!!” [sic]. (APP008).

The striking similarities between this review, and those of “Cecily S.” and “Gabby Debruno,” leads to the logical conclusion that these reviews were written by the same person, which the discovery process can easily confirm.

The Khorsandi Parties claim that the anonymous “Gabby Debruno”, “Cecily S.”, and “You Tuber” (hereinafter “Cecily S.”) are neither Dr. Khorsandi nor Catherine Le. (APP080; APP086). However, the reviews made by “Cecily S.”

started with alarming frequency only after Dr. Smith's original interaction with the Khorsandi Parties. (APP001-25). Additionally, all the reviews follow a similar pattern and contain much of the same language. *Id.* Notably, all three alleged patients had to go to Dr. Khorsandi's practice in Henderson, Nevada, to repair the "mistakes" that Dr. Smith allegedly made. *Id.*

Due to the suspicious timing and common theme of the reviews, the Smith Parties examined the "Cecily S." Yelp profile for evidence connecting it to the Khorsandi Parties. (APP 001-025). The Smith Parties began to compare the reviews made by "Cecily S." to Dr. Khorsandi's social media pages which revealed extraordinary consistencies between the time and location of the posts made by "Cecily S." and Dr. Khorsandi. Not only was "Cecily S." in the exact same city on or about the same days as Dr. Khorsandi, but she would also frequent and review locales that were astonishingly close in distance to Dr. Khorsandi's posted locations. (APP156-159). Assuming this statistical improbability is not enough to connect "Cecily S." to the Khorsandi's, the Khorsandi Parties made a vital mistake in keeping their true identity a secret when they used the "Cecily S." account to promote a business which they own, "Zo Skin Health." (RA015-034). In a review posted by "Cecily S." she declared to be the owner of the Dallas spa. *Id.* A simple search reveals that Dr. Khorsandi is in fact the owner of the spa, just as "Cecily S." claimed in her review. (RA015-034).

Below is a list of Yelp postings from the account of “Cecily S.” which are consistent with Dr. Khorsandi’s posts from his verified Instagram page “docvegas” as evidenced by the content, date, location, and time stamp of the posts. (APP156-159). The Smith Parties apprised the district court of the remarkable overlap between the posts of “Cecily S.” and the Khorsandi Parties during oral argument on the Anti-SLAPP Motion to Dismiss. *Id.* (RA015-034).

<b>“Cecily S.”</b>	<b>Dr. Khorsandi</b>
Published a review for a restaurant in <b>Toronto, Canada</b> (a 1-mile distance from The National Club) on <b>September 8, 2018.</b>	Instagram account shows Dr. Khorsandi posted a picture featuring him as a guest speaker for a medical conference at The National Club in <b>Toronto, Canada</b> on <b>September 7, 2018.</b> The photo advertises his appearance for September 8, 2018.
Published a review for a restaurant in <b>New York City</b> (a 1-mile distance from The St. Regis) on <b>April 28, 2018.</b>	Instagram account shows Dr. Khorsandi posted a picture of himself in <b>New York City</b> on <b>April 30, 2018.</b>
Published a review for a hair salon in <b>New York City</b> (a .3-mile distance from The St. Regis) on <b>April 30, 2018.</b>	Instagram account shows Dr. Khorsandi posted a picture of himself with the location- <b>The St. Regis New York</b> on <b>May 2, 2018.</b>
Published a review for a restaurant in <b>Dallas, Texas</b> on <b>January 01, 2018.</b>	Instagram account shows Dr. Khorsandi posted a picture at the “ZO Skin Centre <b>Dallas</b> ” on <b>January 12, 2018.</b>
Published a review for a restaurant in <b>San Diego, California</b> (a .4 mile distance from the San Diego Convention Center) on <b>April, 29, 2017.</b>	Instagram account shows Dr. Khorsandi posted a group picture with the location- <b>San Diego Convention Center</b> on <b>April 30, 2017.</b> Dr. Khorsandi’s was also tagged in a picture of himself and another person with a <b>San Diego</b> location tag on <b>April 28, 2017.</b>



Published a review on <b>November 06, 2016</b> , for a restaurant in <b>San Francisco, California</b> (a .4 mile distance from Union Square).	Instagram account shows Dr. Khorsandi posted a picture of a lecture with the location- <b>Union Square, San Francisco</b> on <b>November 05, 2016</b> .
Published a review for a coffee shop in <b>Los Angeles, California</b> (a .6 mile distance from the Los Angeles Convention Center) on <b>September 24, 2016</b> .	Instagram account shows Dr. Khorsandi posted a picture of himself with another Doctor at the <b>Los Angeles Convention Center</b> on <b>September 27, 2016</b> .
Published a review for the hotel “Fairmont Kea Lani” for a Deluxe Ocean View suite on the island of <b>Maui, Hawaii</b> on <b>March 01, 2016</b> .	Instagram account shows Dr. Khorsandi posted a picture of himself holding a plane ticket for a flight from <b>Los Angeles, California to Kahului, Maui, Hawaii</b> on <b>February 23, 2016</b> .
Published a review for a restaurant in Paia, on the island of <b>Maui, Hawaii</b> on <b>March 01, 2016</b> .	Instagram account shows Dr. Khorsandi posted a picture of himself, seemingly on a balcony with an ocean view, with the location “Fairmont Kea Lani, Maui” (in <b>Hawaii</b> ) on <b>February 26, 2016</b> .
Published a review for a restaurant in Kihei, on the island of <b>Maui, Hawaii</b> on <b>March 01, 2016</b> .	
Published a review for a restaurant in <b>Seattle, Washington</b> on <b>November 15, 2015</b> .	Instagram account shows Dr. Khorsandi posted several pictures, including one of himself, at a conference at the Willows Lodge in <b>Washington</b> on <b>November 15, 2015</b> .
Published a review for a restaurant in <b>Miami, Florida</b> on <b>April 27, 2015</b> .	Instagram account shows Dr. Khorsandi posted a picture with the location “ <b>Star Island, Miami Beach, Billionaire Homes</b> ” on <b>April 25, 2015</b> .
Published a review for a hotel located in <b>South Beach, Florida</b> on <b>May, 06, 2015</b> .	Instagram account shows Dr. Khorsandi posted a picture with the caption “Thanks <b>#Miami</b> . Now back to the home base!” on <b>April 27, 2015</b> .

The following posts also support the inference that “Cecily S.” is Catherine Le:

<b>“Cecily S.” Yelp Post</b>	<b>Catherine Le’s Life</b>
Published a review for a Drybar in New York on April 30, 2018 stating “...I’ve been to so many dry bars across the nation since we travel often. <b><u>We also own Zo Skinhealth clinic in Dallas</u></b> and a few doors down is a dry bar...”	<b><u>Dr. Christopher Khorsandi is listed on the Zo Skin Health website as the Co-owner.</u></b>
Published a review for The St. Regis New York where she stated “ <b>We travel often bc my husband lectures all over the world</b> ” on <b>June 18, 2017</b> .	Dr. Khorsandi does frequently give lectures all over the world, stating as much in a recap of 2018, posted to his Instagram account.
Published a review for a restaurant “Lindo Michoacan” located on 645 Carnegie St. Henderson, Nevada 89052 on March 12, 2015 stating:  “We have eaten here many times. We also do take out for <b>staff lunches</b> here as well. The food is always good and they have great service too. Highly recommend this place.”	Dr. Khorsandi’s Plastic Surgery practice, VIP Plastic Surgery, is located less than two (2) miles away from Lindo Michoacan.  Catherine Le was VIP Plastic Surgery’s Practice Manager who oversaw all aspects of business operations.
Published a review for “New Beginnings <b>OB-GYN</b> ” on <b>June 04, 2014</b> stating “I am 21 weeks pregnant. I am very pleased with Dr. M so far. She is competent and smart. She really takes her time and her staff is very helpful, esp. Betty. They always make me feel so comfortable and I highly recommend her to anyone!”	The Instagram account “ <b>Catherinele13</b> ” posted a picture of a <b>newborn baby</b> with the caption “Our bundle of joy arrived last night” in <b>September 2014</b> .

(See also RA 051-96).

The above is uncontroverted evidence that Appellant Catherine Le is “Cecily S.”

## **SUMMARY OF THE ARGUMENT**

Nevada law is clear. A person who denies making alleged defamatory statements cannot invoke the protections of Nevada's anti-SLAPP statute. Since the Khorsandi Parties deny having made the statements, the Special Motion to Dismiss should have been denied and the case allowed to proceed in the ordinary course. Even if the Khorsandi Parties admitted to making the statements, they are still not protected under the anti-SLAPP statute, because the statements are not good faith communications made in furtherance of the right to petition. However, should this Court determine that the Khorsandi Parties did meet their initial burden, the Smith Parties have established a prima facie case of prevailing on the claim.

Once the district court determined the Nevada Anti-SLAPP statute did not apply, the district court should have ended its analysis, denied the Khorsandi Parties' Special Motion to Dismiss and allowed the case to proceed with discovery in ordinary course.

As such, this Court should remand this matter to the District Court and allow discovery to proceed in ordinary course. In the alternative, this matter should be remanded for an evidentiary hearing to determine who authored the defamatory statements.

## STANDARD OF REVIEW

The Court reviews a district court's denial of an anti-SLAPP motion de novo. *Smith v. Zilverberg*, 481 P.3d 1222, 1226, (Nev. 2021) (citing *Rosen v. Tarkanian*, 453 P.3d 1220, 1222 (Nev. 2019)). In reviewing the district court's grant or denial of an Anti-SLAPP motion, this Court must "accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

## ARGUMENT

### **I. Legal Standard For A Nevada Anti-SLAPP Motion To Dismiss**

"A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights." *Stubbs v. Strickland*, 129 Nev. 146, 297 P.3d 326 (2013). Nevada's anti-SLAPP law is intended to protect certain good faith communications that are truthful or made without knowledge of their falsehood, provided that they are "[m]ade in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4). Anti-SLAPP statutes provide defendants with a procedural mechanism whereby they may file a special motion to dismiss the meritless lawsuit before incurring significant costs of litigation. NRS 41.660(1); *Stark v. Lackey*, 136 Nev. 38, 458 P.3d 342 (2020).

Nevada’s anti-SLAPP statutes posit a two-prong analysis to determine the viability of a special motion to dismiss. *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019). In the first prong, the district court must “[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.” NRS 41.660(3)(a).

Prong one of the analysis has two components; (1) the comments at issue must fall into one of the four categories of protected communications enumerated in NRS 41.637; and (2) the communication must be truthful or made without knowledge of its falsehood. *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). A defendant must establish both of the components under the first prong of the anti-SLAPP statute before the district court can move on to the second prong. If the district court finds the defendant has met his or her burden in the first prong, the court must then “determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim” in the second prong. NRS 41.660(3)(b).

Here, the statements contained in the public reviews do not automatically qualify as protected speech, given that the reviews may have been authored by an individual who has never been a patient nor received the medical treatment being

criticized, which would make the statements in the reviews knowingly false, in direct contradiction with the second component of the first prong of the Nevada Anti-SLAPP statute.

**A. Nevada's Anti-SLAPP Statute Does Not Protect Individuals Who Deny Making the Defamatory Statements.**

The Khorsandi Parties deny authoring the statements at issue yet they have attempted to invoke the anti-SLAPP statute which is intended to protect an individual's right to free speech. Nevada's Anti-SLAPP protections serve as a defense against lawsuits that would otherwise dissuade or penalize those who would *appropriately* exercise their First Amendment rights. The statute is not intended to protect individuals who deny making defamatory statements as the Khorsandi Parties have because the protection only applies to statements made in an appropriate exercise of a person's First Amendment right. By denying making the statements, the Khorsandi Parties have forfeited the right to invoke the anti-SLAPP statute.

**1. Nevada's Anti-SLAPP Statute is Narrower Than California.**

The Khorsandi Parties urge this Court to broaden the protections afforded by the anti-SLAPP statute to include protections of persons who deny making the statements. However, such broadening is inconsistent with the purpose of the Nevada anti-SLAPP statute. Both Nevada and California Anti-SLAPP statutes aim to protect First Amendment rights by providing defendants with a procedural

mechanism to dismiss meritless lawsuits that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights before incurring the costs of litigation. Nev. Rev. St. § 41.660.

Although similar in purpose and language, California and Nevada's Anti-SLAPP statutes are not indistinguishable. Historically, the speech and the circumstances in which the Nevada's Anti-SLAPP statute applies is narrower than California's Anti-SLAPP statute which is intended to cover a vast range of subjects that were of the public interest and made in a public forum. Specifically, California Code of Civil Procedure Section 425.16, the anti-SLAPP statute, allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances.

While both Nevada and California set forth a two-step process for determining whether an action is a SLAPP suit, Nevada's anti-SLAPP statute is more narrowly tailored and requires an additional showing from the party seeking the protection. In Nevada, the communication must fall within one of the four categories of protected communications enumerated in NRS 41.637. *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). Nevada law limits the use of Anti-SLAPP to these four enumerated categories, which is significantly more constricted than the California Code which protects "[a]ny act of in furtherance of the person's right of petition or free speech under the United States Constitution or the California

Constitution in connection with a public issue”. California Code of Civil Procedure (“CCP”) Section 425.16.

In addition, the Nevada statute requires the moving party to establish that the communication is truthful or is made without knowledge of its falsehood. NRS 41.637. This provision is not contemplated by the broader California law. Only if the movant has met these initial burdens may the Court then proceed to the second prong of the statute and consider whether the Plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3)(a). As such, the plain language of the Nevada Anti-SLAPP statute is irrefutably more restrictive than the language of its California counterpart and must be applied as such.

**a. The Khorsandi Parties’ Reliance on California Case Law Fails.**

The Khorsandi Parties argue that this Court should follow the decision of the California Court of Appeals in *Bel Air Internet, LLC v. Morales*, 230 Cal. Rptr. 3d 71 (2018). In *Bel Air*, a company brought an action against a former employee who was alleged to have encouraged other employees to quit and sue the company. *Id.* at 77. The employee filed a motion to strike under California’s anti-SLAPP statute. *Id.* Despite denying having made the offending statements, the employee argued that such speech would nevertheless be protected conduct under as it was made in connection with petitioning activity protected by the anti-SLAPP statute. *Id.* The California Court of Appeals found for the employee and held that, “[i]f the complaint



itself shows that a claim arises from protected conduct . . . a moving party may rely on the plaintiff's allegations alone in making the showing necessary under prong one without submitting supporting evidence.” *Id.* at 80.

Nevada's anti-SLAPP statute is much narrower than the California statute. California recognizes that an anti-SLAPP special motion to strike may be brought against “[a] cause of action against a person arising from *any act* of that person *in furtherance of the person's right of petition or free speech* under the United States Constitution or the California Constitution in *connection with a public issue*.” California: CA CIV PRO § 425.16(b)(1).

Since the Khorsandi Parties denied making the public posts and the statements contained within the posts do not automatically qualify as protected speech, the district court properly concluded its anti-SLAPP analysis.

**B. A Review of Medical Treatment is Not an Issue of Public Concern if the Author Has Never Been a Patient Nor Received The Treatment Referenced in The Reviews.**

Unlike California, Nevada anti-SLAPP statute protects only “a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.” NRS 41.660(1). The difference of language between the two statutes is clear and unambiguous.

Here, the Khorsandi Parties argue that because the statements supposedly arose from an evaluation of the quality of medical care the statements constitute an

issue of public concern, and are therefore protected under the statute. However, this assertion blatantly ignores the good faith requirement outlined in NRS 41.660(1).

As the district court correctly asserted within its Order, statements regarding medical care do not automatically qualify as protected speech under Nevada's Anti-SLAPP statutes. There is a difference between an individual posting a review about medical treatment which they actually received and a competitor posting false medical reviews in an attempt to harm a business.

The Khorsandi Parties attempt to seek refuge under NRS 41.660 but have failed to meet the initial burden to show that the communications in question are even protected by the anti-SLAPP statute. *Delucchi v. Songer*, 396 P.3d 826, 831 (Nev. 2017). The Khorsandi Parties have failed demonstrate they are entitled to protection under Nevada's anti-SLAPP statute, because they cannot show by a preponderance of evidence that the statements were good faith communications in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, which are truthful or made without knowledge of its falsehood.

Of utmost importance to the instant matter, is how a communication which qualifies for protection under anti-SLAPP is defined. NRS 41.637 defines a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" as any of the following:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,

which is truthful or is made without knowledge of its falsehood.

At issue in this case is subsection 4, regarding a communication made in direct connection with an issue of public interest in a place open to the public or in a public forum.

The district court found that the quality of a doctor's patient care is most certainly an issue of public interest and review sites like Yelp are public forums. However, the district court made it clear that if discovery reveals that the Khorsandi Parties did author the reviews, the reviews would be made in bad faith, given that neither Dr. Khorsandi nor Catherine Le have ever been patients of Dr. Smith and therefore, the reviews contain knowingly false statements. (APP170; APP152).

Therefore, the central issue in this case is the identity of the individual who posted the public reviews criticizing Dr. Smith's medical care and treatment, which is a question of fact.

Although the online reviews have to do with the evaluation of medical treatment, the individual who authored the reviews must first be determined in order for the court to properly assess whether the online reviews qualify for protection under Nevada's anti-SLAPP laws. As the District Court stated:

...there is a fine line between saying that evaluation of a doctor's care is protected speech and saying that potentially false statements are protected just because the subject matter of the false statements regard a doctor's care. (APP173).

Therefore, without establishing the identity of the individual who authored the online posts, the Khorsandi Parties cannot demonstrate the public reviews are good faith communications, nor that the statements contained therein are truthful or made without knowledge of falsehood. Therefore, anti-SLAPP does not apply because the identity of the author is a question of fact and the case must be permitted to move forward with discovery. If discovery reveals that the Khorsandi Parties authored the online reviews, the reviews would be knowingly false and thus not protected under Nevada's anti-SLAPP statute. As such, the district court properly concluded its anti-SLAPP analysis without determining whether the Smith Parties demonstrated with prima facie evidence a probability of prevailing on the claim.

If the online review was made by an individual who actually received medical treatment from Dr. Smith, then the statements may be subject to protection under Nevada's anti-SLAPP statute. However, if discovery reveals that the Khorsandi Parties authored the online reviews, then the Khorsandi Parties cannot demonstrate

a "good faith communication" required under the Nevada statute because the statements would not constitute a communication which is truthful or is made without knowledge of its falsehood because neither have been patients of Dr. Smith.

**1. Appellants Rely On Cases Which Are Distinguishable From This Matter.**

The Khorsandi Parties rely on a number of cases that are distinguishable from the matter at hand in an effort to support their theory that the Khorsandi Parties met their burden of establishing the statements were good faith communications. In *Rosen v. Tarkanian*, 135 Nev. 436, 453 P.3d 1220 (2019), the Court considered a political ad created by the defendant that contained negative statements of the plaintiff's past business dealings. 453 P.3d at 1222. The Court found that additional evidence affirming the "gist or sting" of the alleged defamatory statements showed that the statements were substantively true. *Id.* at 1224. The defendant also "asserted that she believed that the statements were true based on multiple public accounts and Tarkanian's own admissions about his involvement with the corporations." *Id.* at 1222. In *Rosen*, the court concluded that Rosen met her burden under the first prong of the anti-SLAPP statute because the "gist or sting" of her statements were substantially true or made without knowledge of their falsehood.

This substantially differs from the statements at issue in this case. Here, the Khorsandi Parties have provided no evidence to suggest the statements contained within the public reviews are true, nor have they been patients of Dr. Smith.If

discovery reveals that the Khorsandi Parties did author the statements and posted knowingly false reviews criticizing Dr. Smith's medical care and treatment, the Khorsandi Parties will not be able to meet their burden and prove that the statements contained within the public review are true or made without knowledge of their falsehood because neither have ever been Dr. Smith's patients, and unlike *Rosen*, the Smith Parties do not admit to any of the allegations put forth by the aforementioned parties.

The Court's analysis in *Rosen* also influenced the Court's decision in *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212 (2020), which the Khorsandi Parties also mistakenly rely on. In *Taylor*, the plaintiff sued based on a presentation given by Taylor regarding the use of cheating devices in casinos. 468 P.3d at 822. Colon claimed that he was identifiable as one of the individuals used as an example in the presentation and stated that the presentation labeled him as a cheater and a criminal. *Id.* Taylor maintained that the alleged defamatory statements were based on information personally acquired through his work as Deputy Chief of the Enforcement Division of the Nevada Gaming Control Board. *Id.* Ultimately, the Court held that Taylor's declaration regarding the source of the information used in the presentation, as well as his declaration that the information was true and accurate, were sufficient to show good faith. *Id.* at at 826.

The *Taylor* Court’s holding is distinguishable from the matter at hand. Unlike *Taylor*, the Khorsandi Parties in this case deny authoring the public reviews. Therefore, the Khorsandi Parties cannot establish that the statements were good faith communications made without knowledge of falsehood. As such, there can be no analysis under anti-SLAPP.

Finally, the Khorsandi Parties improperly rely on the holding in *Stark v. Lackey*, 136 Nev. 38, 458 P.3d 342 (2020) wherein the Court determined that an affidavit attesting truthfulness or the lack of knowledge of the statement’s falsehoods may meet the evidentiary burden required by NRS 41.660(3)(a). *Stark*, 458 P.3d at 347. Specifically, the *Stark* Court held, “[A]n affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant’s burden absent contradictory evidence in the record.” *Id.* (emphasis added).

*Stark* is distinguishable from the instant matter because the public reviews made by the the Khorsandi Parties, criticize medical treatment they never received and defame the reputation of a doctor they never treated with. The Khorsandi Parties contend that their signed declarations absolve them of any connection to the Yelp reviews that are at issue. However, given the current evidence, it is clear that further discovery will affirm Respondents position that the Khorsandi Parties were responsible for the defamatory statements. The District Court agreed with the

proposition that the identity of the person who authored the review was at issue, and determined that that discovery was necessary. (RA001). Further, even the Khorsandi Parties conceded that often times, declarations need to be challenged for truthfulness. (APP164).

In relying on these cases, the Khorsandi Parties erroneously argue that because other negative reviews exist that the fictitious and defamatory reviews at issue here must also be made in good faith. However, this argument fails to recognize that Respondents never treated the Appellants, “Cecily S.”, “Gabby Debruno”, or “You Tuber.” The Khorsandi Parties have provided no evidence to show that these statements were made in good faith or truthful. Since the Appellants, “Cecily S.”, “Gabby Debruno”, and “You Tuber” were never patients of Dr. Smith, the reviews *cannot* have been made in good faith. As such, this Court should affirm the lower court’s denial of the Appellants’ special motion to dismiss and allow discovery to proceed in ordinary course as the Appellants did not meet their burden by a preponderance of evidence that the communications are protected under NRS 41.660(3)(a).

## **2. Public Policy Favors Denial of the Khorsandi Parties’ Special Motion to Dismiss.**

Nevada’s Anti-SLAPP law provides protection for individuals, including those who *fairly and accurately* report on matters of public interest and serve as a



defense against lawsuits that would otherwise dissuade or penalize those who would appropriately exercise their First Amendment rights.

Public policy favors denial of the Khorsandi Parties Anti-SLAPP motion and remand to the district court. In their appeal, the Khorsandi Parties are asking this Court to allow an individual who has never received medical treatment from Dr. Smith, to go onto a public forum, which is often frequented by potential clients, and post defamatory reviews criticizing medical treatment they have never received with no recourse. Such action will open the door for businesses to leave false reviews disparaging competing businesses and lie about products or services with reckless abandon, then deny making the statements and receive the benefit from their behavior and seek protection under a statute intended to protect free speech. It cannot be the intention of this Court, nor the legislature that the Nevada Anti-SLAPP statute to provide a safeguard for this offensive behavior.

**C. The Smith Parties Have Shown With Prima Facie Evidence, That They Can Prevail on The Original Claim.**

Nevada's Anti-SLAPP statute does not protect individuals who deny authoring the defamatory statements. Additionally, the Khorsandi Parties cannot establish that a public review of medical treatment is an issue of public concern if the individual who authored the review has never been a patient nor received the medical treatment referenced within the reviews. As such, the Khorsandi Parties failed to meet their statutory burden required by the first prong of the anti-SLAPP

statute, and it is unnecessary for this Court to move forward with the analysis and consider the second prong of NRS 41.660.

However, if this Court determines that the Khorsandi Parties did somehow make this initial showing, the Smith Parties still prevail, because they have satisfied the second prong of the statute by showing, with prima facie evidence, that they can prevail on the original claim. *Shapiro*, 389 P.3d at 267 (citing NRS 41.660(3)(b)). The plaintiff is only required to establish “whether [his or her] claims had minimal merit.” *Abrams v. Sanson*, 458 P.3d 1062, 1069 (Nev. 2020).

Here, the Complaint alleges facts that support the contention that the Khorsandi Parties posted the reviews under falsely named accounts with knowledge of the falsity of the statements. These fictitious reviews were made with the intent of harming Dr. Smith’s business and reputation. Preliminary research substantiates the notion that the Khorsandi Parties were responsible for these posts. (RA052-96). The Smith Parties have met the statutory evidentiary burden to withstand the low threshold of prevailing on the merits.<sup>1</sup> (APP001-025). Dr. Smith is confident that further discovery will confirm that the Khorsandi Parties are responsible for the defamatory posts. Therefore, this Court should allow discovery to proceed in ordinary course.

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<sup>1</sup> On January 25, 2021, Respondents filed a Motion for Case Terminating Sanctions in the district court. This Motion set forth additional evidence which verifies that Appellants are “Cecily S.” in direct contradiction of Appellants’ declarations submitted to both the district Court and this Court to falsely rely upon. (RA015-099).

**D. Respondents Sufficiently Plead Facts To Withstand Dismissal Pursuant To NRCP 12(B)(5).**

NRCP 12(b)(5) governs a motion to dismiss for failure to state a claim upon which relief can be granted. The court must accept all factual allegations in the complaint as true, and draw all inferences in the plaintiff's favor. *Buzz Stew, Ltd. Liability Co. v. City of N. Las Vegas*, 124 Nev. 224 (2008). The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the legally sufficient claim and relief requested. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842 (1993).

Here, the Smith Parties plead facts in the Complaint sufficient to support their claims and meet Nevada's liberal pleading standard. The Complaint is clear as to which statements are defamatory and why. The Smith Parties have alleged that the Khorsandi Parties are in possession of necessary information to establish their claims, thus requiring discovery. In *Rocker v. KPMG LLP*, 122 Nev. 1185, 148 P.3d 703 (2006), this Court determined when the facts necessary for pleading with particularity "are peculiarly within the defendant's knowledge or are readily obtainable by him," the pleading standards are relaxed because the "plaintiff cannot be expected to have personal knowledge of the relevant facts."

The District Court properly held the Smith Parties have met the very low threshold for surviving a NRCP 12(b)(5) motion to dismiss because he and his practice have stated claims on which relief can be granted. (APP174).

### **CONCLUSION**

Nevada law is clear. A person who denies making alleged defamatory statements cannot invoke the protections of Nevada's anti-SLAPP statute. Since the Khorsandi Parties deny having made the statements, the Special Motion to Dismiss should have been denied and the case allowed to proceed in the ordinary course. Even if the Khorsandi Parties admitted to making the statements, they are still not protected under the anti-SLAPP statute. The Khorsandi Parties have failed to meet their initial burden of showing, by a preponderance of the evidence, that the lawsuit is based upon a good faith communication in furtherance of the right to petition. However, should this Court determine that the Khorsandi Parties did meet their initial burden, the Smith Parties have established a prima facie case of prevailing on the claim.

Once the district court determined the Nevada Anti-SLAPP statute did not apply, the district court should have ended its analysis, denied the Khorsandi Parties' Special Motion to Dismiss and allowed the case to proceed with discovery in ordinary course.

As such, this Court should remand this matter to the District Court and allow discovery to proceed in ordinary course. In the alternative, this matter should be remanded for an evidentiary hearing to determine who authored the defamatory statements.

DATED this 21<sup>st</sup> day of September, 2021.

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## **ATTORNEY'S CERTIFICATION OF COMPLIANCE**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this appellate brief, it complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 8,793 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21<sup>st</sup> day of September, 2021.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of SGRO & ROGER, and that on this 21<sup>st</sup> day of September, 2021, I caused to be e-filed/e-served through the Court's website true and correct copies of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** to the following:

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